UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CABELL HUNTINGTON HOSPITAL, INC.

Employer [1]/

and Case 9-UC-495

SERVICE EMPLOYEES INTERNATIONAL UNION
DISTRICT 1199 WV/KY/OH

Petitioner [2]/

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

I. INTRODUCTION

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The Employer is engaged in the operation of a non-profit hospital in Huntington, West Virginia. The extant collective-bargaining agreement between the Employer and the Petitioner is effective by its terms through November 2, 2010. According to the stipulation of the parties, the Petitioner is the recognized bargaining representative of a bargaining unit consisting of:

> "[A]ll of the employees at the Employer's facility located at 1340 Hal Greer Blvd, Huntington, West Virginia, and its locations, including operations and facilities known as the following: Information Systems, the Business Office, the Balance Center, Hemodialysis, Pain Services, the Perinatal Clinic, the Breast Center, Portsmouth Aeromed, Home Health and Managed Care, but excluding all supervisors, security personnel, doctors, temporary employees, casual employees, registered nurses, medical technologists (4 yr., ASCP), pharmacists, physical therapists, respiratory therapy technicians III, medical records department personnel, medical laboratory technicians (2 yr., ASCP), interns, residents, clinical laboratory technicians (CLA), cytogeneticists, the in-service secretary, the pharmacy secretary, the nuclear medicine technologist, the special procedure technologist and ultrasound technologist."

There are approximately 805 employees within the bargaining unit. The Petitioner seeks to clarify the existing bargaining unit by including certain employees employed at the Cabell Huntington Surgery Center.

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[1]/ The name of the Employer appears as amended at the hearing.

[2]/ The name of the Petitioner appears as amended at the hearing.

In support of its position, the Petitioner contends that the Employer (hereinafter called the Hospital) and the Huntington Surgery Center, Limited Partnership d/b/a Cabell Huntington Surgery Center (hereinafter called the Surgery Center) constitute a single employer and that certain employees of the Surgery Center share an overwhelming community of interest with the currently represented employees, which warrants their inclusion into the existing bargaining unit. Specifically, the Petitioner is seeking to include employees at the Surgery Center working in the same job classifications that the Petitioner represents at the Hospital. The Hospital argues that it and the Surgery Center are not a single employer and that the Surgery Center employees do not share a sufficient community of interest with the bargaining employees to warrant their inclusion into the existing bargaining unit.

The parties presented a joint exhibit (Joint Exhibit #4) listing employees presently employed at the Surgery Center together with their respective job classifications. Based on this exhibit, it appears there are 14 persons in similar unit classifications that the Petitioner seeks to accrete, including sterile processing clerk, instrument technician, environment service aide, surgical technician-noncertified, surgical technician, business office clerk, surgery scheduler and health information management service coder. [3]/

I have fully considered the record evidence and the arguments of the parties made at both the hearing and in their post-hearing briefs. I find, based on the record as a whole, that the Hospital and the Surgery Center are a single employer. However, I have concluded that the record fails to support a finding that there is an overwhelming community of interest between the Hospital and Surgery Center employees to warrant accreting the Surgery Center employees into the existing bargaining unit.

Accordingly, I find that the clarification of the bargaining unit to include the Surgery Center employees is not warranted. In explaining how I came to my conclusion, I will first provide a brief overview of the Hospital's and Surgery Center's operations, then set forth the applicable legal precedent, and finally analyze the issues in relation to that precedent.

II. FACTUAL OVERVIEW OF THE HOSPITAL AND SURGERY CENTER OPERATIONS

The Surgery Center, an ambulatory surgery center, is located at 1201 Hal Greer Boulevard, down the block and across the street from the Hospital. The Surgery Center is a limited partnership comprised of a general partner and limited partners. The Hospital, which is the general partner, owns 51 percent interest in the Surgery Center and approximately 15 physicians own a 49 percent interest in the limited partnership. The Surgery Center has a separate tax identification number from that of the Hospital and its own payroll system.
Lexa Woodyard is the administrator of the Surgery Center, Floyd Adams is a maintenance manager and Delores Blatt and Sharyn McDonald are nurse managers.

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[3]/ The record testimony indicated that there is a housekeeping employee employed by the Surgery Center. However, no person employed as a housekeeper is listed on Joint Ex. 4. The Union asserts that there are 20 employees who should be accreted, but a review of Joint Exhibit #4 shows only 14 employees in the applicable job classifications. There are 20 employees if the casual employees are included. However, under the current contractual unit description, "casual" employees are specifically excluded from the bargaining unit.

The Hospital, which has had an ownership interest in the Surgery Center for some period of time, became a majority owner and general partner of the Surgery Center on April 1, 2008 and, at the same time, entered into a management agreement (herein called the Agreement) with the Surgery Center by which the Hospital assumed responsibility for managing the Surgery Center. The Agreement provides that the Surgery Center:

> "hereby retains the Manager for the purpose of rendering management, administration and purchasing services and support . . . subject to the policies established by the Owner. . . All such services shall be rendered using the Manager's best efforts and subject to the control of the Owner, which shall have final authority in all matters relating to the Center's operations."

The Agreement further provides that the Hospital, as Manager, would render many managerial services, including "Employing, supervising directing, leasing, and discharging on behalf of the Owner all non-physician personnel performing services at the Center, including the administrator of the Center, as needed;" and, "Providing policies and operation procedures to all departments." The Agreement provides that the Surgery Center will pay the Hospital for expenses and a percentage of the gross revenues as a fee for these managerial services.

Barry Tourigny, the Hospital's vice president of human resources and organizational development, testified that the Hospital provides a wide range of services to the Surgery Center, including maintenance of the facility, financial services, and oversight of human resources pursuant to the Agreement. Hospital bargaining unit employees, in connection with the Agreement, perform maintenance work, "human resource oversight work," benefits administration, and "environment of care work." He testified, "that we have some managers who have cross-function." In particular, Tourigny stated that the Hospital's director of surgery has some oversight responsibility for the Surgery Center; however, the extent and manner of this oversight is not reflected in the record. Moreover, from Tourigny's testimony ("managers" cross function) it appears that there may be other managers who have a role in the Surgery Center, but this relationship was not explored on the record at the hearing. Tourigny and Marlon Taylor, the Hospital's director of employee relations, testified that the Hospital bills the Surgery Center for these services. However, there is no record evidence showing that bills were submitted and paid, and no evidence was presented concerning the consequences of late or overdue payments.

The record reflects that there was some discussion during negotiations for the most recent contract over including Surgery Center employees. The testimony in this regard is somewhat unclear and conflicting. However, it is clear, that at the time these negotiations took place, the Hospital did not own a majority interest in the Surgery Center. The record further disclosed that there is a letter of agreement between the Employer and Petitioner pertaining to wholly owned physician practices, wherein the Employer agrees to remain neutral during organizing and to recognize the Union if it secures a simple majority of authorization cards. The parties further agreed that these employees would not be included in the Hospital bargaining unit. The record reflects that this letter of agreement does not apply to the petitioned for employees working at the Surgery Center.

There is no record evidence showing that employees are transferred from the Surgery Center to the Hospital or from the Hospital to the Surgery Center on a temporary or permanent basis. The record discloses that, when needed, Hospital bargaining unit housekeeping and

maintenance employees perform work at the Surgery Center that is similar to the work they perform at the Hospital's main facility and its offsite locations. The Employer contends that the housekeeping and maintenance services are part and parcel of the Hospital's obligations under the Agreement. Mark Burns, a Hospital housekeeping employee/floor specialist, testified that he is assigned to do cleaning work at the Surgery Center by his immediate supervisors at the Hospital. He transports himself to the Surgery Center in a Hospital truck, uses Hospital equipment and wears his Hospital uniform. If he has a concern or issue while working at the Surgery Center, he usually speaks to his immediate supervisor at the Hospital.

Frank Williams, Hospital bargaining unit employee, similarly testified that he performs maintenance work as needed at the Surgery Center as do the other 42 Hospital maintenance employees. He further testified about a grievance that he filed under the collective-bargaining agreement concerning subcontracting, in which he claimed that certain construction work at the Surgery Center should be awarded to the unit maintenance employees rather than contracted out. In response to the grievance, the director of maintenance assigned the work to the maintenance employees. Neither Williams nor Burns were sure whether the cost of their work is billed to the Surgery Center. Both Williams and Burns receive only one paycheck, from the Hospital, and they clock in and out at the Hospital when they work at the Surgery Center. Burns testified that there is a housekeeping employee employed by the Surgery Center but he does not work with her and the record indicates that Williams has little contact with Surgery Center employees.

The record reflects that there are two surgery technicians, Joseph Colliflower and Michael Damron who are "casual", or also referred to in the record as "pool", employees of the Surgery Center and are also employed as surgery technicians on a full-time basis at the Hospital. As I noted earlier, casual positions would not be accreted into the current bargaining unit. The record disclosed that the duties, responsibilities and protocols expected of surgery technicians while at the Surgery Center mirror those demanded by the Hospital. However, the evidence indicates that such similarity is a result of the nature of the position of surgery technician rather than a byproduct of any interrelationship between the two facilities.

Colliflower testified that he had to apply and interview with management from the Surgery Center when he sought the position. The record reflects that he is never assigned to work at Surgery Center by Hospital management and he is paid by the Hospital for work performed there and by the Surgery Center for work performed at the Surgery Center. It is undisputed that he is supervised by different managers depending on where he is working.

The record discloses that certain specialized equipment used during surgeries, such as cameras, light cords, and eye lenses, need to be cleaned and sanitized by a sterad machine. The Hospital has a sterad machine and the Surgery Center does not. Thus, about three or four times per month, the Surgery Center will deliver this specialized equipment to the Hospital and the Hospital O.R. sterile tech will clean and sanitize the instruments. This requires little to no contact between the Hospital O.R. sterile technician and the Surgery Center O.R. sterile technician or any other Surgery Center employee for that matter. Additionally, the Surgery Center sometimes "borrows" instruments.

III. LEGAL FRAMEWORK

The accretion of employees through unit clarification petitions result in the inclusion of employees to bargaining units without affording these employees an opportunity to vote in a

secret ballot election or to express their sentiments about union representation through some other accepted method. The Board, therefore, applies a "restrictive" policy in determining whether to clarify units to accrete employees into existing units. See, *Melbet Jewelry Co., Inc*., 180 NLRB 107 (1969); *United Parcel Servi*ce, 303 NLRB 326 (1991); *Ryder Integrated Logistics, Inc*., 329 NLRB 1493 (1999). Indeed, the Board will find an accretion only when the employees sought to be accreted into an existing unit have little or no separate group identity and, therefore, cannot be considered a separate appropriate unit and when the additional employees have an overwhelming community of interest with the existing unit. *Frontier Telephone of Rochester, Inc.,* 344 NLRB 1270, 1271 (2005); *Archer Daniels Midland Co*., 333 NLRB 673 (2001).

In determining whether a group of employees should be accreted into an existing bargaining unit the Board examines a variety of factors including integration of operations; centralization of management and administrative control; geographic proximity; similarity of working conditions, skills and functions; common control of labor relations; collective bargaining history; degree of separate daily supervision; and, degree of employee interchange. The Board has found that the two most compelling factors of the many considered such that they are considered "critical" to an accretion finding are employee interchange and common day-to-day supervision. Thus, "the absence of these two factors will ordinarily defeat a claim of lawful accretion." *Milwaukee City Center, LLC*, 354 NLRB No. 77 (September, 2009), quoting *Frontier Telephone of Rochester, Inc*., supra at 1271 and fn. 7; *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

However, before reaching the accretion issue, I shall determine whether there is sufficient evidence to support Petitioner's contention that the Hospital and Surgery Center constitute a single employer. *Byran Intfants Wear Company*, 235 NLRB 1035 (1978). A single employer exists when two or more employing entities are in reality a single integrated enterprise. See, *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283 (2001). In determining single employer status, the Board and courts consider four factors: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations. See, *Radio Union v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256 (1965); *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). All of these criteria need not be present to establish single-employer status, which ultimately depends on all the circumstances of a case and is characterized by the absence of an arm's-length relationship found among unintegrated companies. *Central Mack Sales*, 273 NLRB 1268, 1271-72 (1984); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980); *Emsing's Supermarket*, 284 NLRB at 304; See also *Lebanite Corp*., 346 NLRB 748, (2006). Although none of these factors are controlling, the Board has stressed the importance of the first three factors, particularly centralized control over labor relations. *Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001); *Herbert Industrial Insulation Corp*., 319 NLRB 510 (1995).

IV. ANALYSIS

I. <u>Single Employer Status:</u>

Common Ownership and Management.

The record reflects that the Hospital is the general partner and owns a 51 percent interest in the Surgery Center. Brent Marsteller is the president and CEO of the Hospital and the record

contains an organizational chart showing the Hospital's managerial hierarchy. However, the record does not indicate who the officers are for each facility, who sits on the board of directors, or any related governing body of each facility. Thus, I can not determine if any overlap exists among the officers of the Hospital and Surgery Center. Tourigny testified that the Hospital's Director of Surgery has some oversight responsibility over the Surgery Center but he did not provide any details concerning this oversight. However, given that the Hospital owns a majority interest in the Surgery Center, I find that there is evidence of common ownership. *Pathology Institute*, 320 NLRB 1050, 1058 (1996), enfd. mem. 116 F.3d 482 (9th Cir. 1997), cert. denied 522 U.S. 1028 (1997); *Consolidated Dress Co*., 259 NLRB 627 (1981).

Regarding common management and centralized control over labor relations, the Hospital, under the Agreement, has the authority to play an extremely significant role in managing the Surgery Center and over labor relations. In particular, the Agreement provides that the Hospital, as Manager, is responsible for, among other things:

> "Employing, supervising, directing, leasing, and discharging on behalf of the Owner, all non-physician personnel performing services at the Center, including the administrator of the Center, as needed; . . . Establishing staffing schedules, wage structures and personnel policies for all personnel; Determining and setting patient charges for services provided by the Center; Providing policies and operating procedures to all departments; . . . Providing for the purchase or lease by the Owner the of all supplies and equipment used in the operation of the Center; [and] Directing day-to-day operations of the Center to ensure the operations are conducted in a business-like manner."

The Petitioner presented scant evidence showing how often and to what degree the Surgery Center calls upon the Hospital to exercise its authority and how this authority is implemented in these many areas. For example, the Petitioner failed to adduce any testimony showing who interviewed and hired the Surgery Center's administrator and other management personnel or who directs and evaluates them. Similarly, there is no evidence disclosing the rules, policies, wages and benefits covering the Surgery Center employees and who, in fact, established these working conditions.

However, the record clearly reveals that Tourigny has oversight responsibility for labor relations and employment matters affecting Surgery Center employees as a result of the Agreement. In particular, Tourigny testified that he interacts with Lexa Woodyard, administrator of the Surgery Center, over a variety of matters including employee disciplinary matters, policy interpretation and rewrites, and benefits administration. Regarding disciplinary matters, he testified that his role is advisory, that he does not have to approve Woodyard's decisions, and that ultimately it is the partners who decide if an employee is disciplined. [4]/ Tourigny also indicated that the Hospital oversees the Surgery Center's finances. Furthermore, the Hospital's Director of Surgery also has some oversight responsibility over the Surgery Center.

The Hospital is paid for its managerial services and the Hospital's control and authority as Manager is not unlimited. Decisions the Hospital makes in its capacity as manager are

[4]/ I note that much of Tourigny's testimony on this topic was largely in response to leading questions. Although this proceeding is not adversarial, this type of testimony inspires concern regarding its probative value.

ultimately, "subject to the control of the Owner, which shall have final authority in all matters relating to the Center's operations." Of course, the Owner is the Partnership, in which the Hospital has a controlling interest. The parties did not offer any partnership agreement into evidence or present testimony detailing how the Partnership is controlled and decisions are made and whether, for example, the partners are given equal voting power in decisions, or whether decision making is in line with ownership interest. Nevertheless, given the breadth and depth of control the Hospital has over management and labor relations of the Surgery Center pursuant to the Agreement, along with the absence of evidence to indicate that the Hospital as Manager does not exercise its authority, I find that there is common management and centralized control over labor relations. I find that the managerial and labor relations control even more potent because it is only limited by the Owner, of which the Hospital has majority interest. Cf. *Great Lakes Chemical Corp*., 323 NLRB 749 (1997); *United Brotherhood of Carpenters*, 312 NLRB 903 (1993).

Functional interrelations of operations:

Regarding the criteria of functional interrelation of operations, it is clear that housekeeping and maintenance staff from the Hospital perform cleaning and maintenance duties at the Surgery Center pursuant to the Agreement. [5] / Indeed, with respect to certain construction work at the Surgery Center, the Hospital was initially going to subcontract out the work but, pursuant to a grievance settlement, awarded the work to unit maintenance employees. The record indicates that a majority of physicians working at the Surgery Center are also employed by the Hospital but the value of this testimony is limited in the absence of any evidence surrounding their employment relationships with each facility. The evidence further reflects that the Surgery Center uses the Hospital's sterad machine to clean and sanitize specialized instruments and sometimes borrows instruments. Yet it appears, apart from the sterad machine, the Hospital and Surgery Center operate in their distinct facilities utilizing their own equipment. Patients may be transferred to the Hospital if an emergency arises at the Surgery Center, however, the record fails to show how patients are initially referred to the Surgery Center or whether Hospital physicians are under any obligation to first refer patients to the Surgery Center. There is no evidence revealing the Surgery Center's admissions process, its location, and if there is any coordination of patient admissions with the Hospital. Moreover, there is no record evidence showing if the Surgery Center is presented to the public as a single integrated enterprise with the Hospital.

The record does reflect that the employees of the Surgery Center are not on the Hospital's payroll, enjoy different benefits and that the Surgery Center maintains separate financial records and files separate tax returns. The Petitioner did not present any evidence showing that the Hospital and Surgery Center shared certain services including legal, advertising, computer, internet and insurances services. Finally, it appears there is minimal interaction between the petitioned for group of employees and the existing bargaining unit and there is apparently little to no interdependency in executing their job functions. In this regard, housekeeper Burns testified that he never works with the Surgery Center's housekeeper and does not even know her name. Similiarly, maintenance employee Williams testified that he does not know or work with any of the Surgery Center's employees. Based on the foregoing, I find, on balance, that the evidence

[5]/ Housekeeping employee Burns testified that he recently got a key to access the surgery center whereas in the past a surgery center supervisor had to let him inside.

pertaining to functional interrelations of operations does not convince me of single employer status.

After considering the record as a whole, the arguments of the parties and the legal precedent described above, I find that the Hospital and Surgery Center are a single employer. In doing so, I note that not all of the four elements cited above need be present to find that two entities constitute a single employer. *Central Mack Sales*, 273 NLRB 1268 (1984). On balance, I find that the evidence of common ownership, management, and centralized control of labor relations weighs in favor of a single employer finding. Thus, I find that for purposes of this proceeding, the Hospital and Surgery Center constitute a single employer.

However, a finding of single employer status does not compel an employer-wide bargaining unit. Rather, the evidence must establish that the Surgery Center employees share such an "overwhelming" community of interest with the existing unit to warrant an accretion and I find that the evidence failed to support such a conclusion. *South Prarie Construction Company*, 425 U.S. 800 (1976); *Herbert Industrial Construction Corp*., 319 NLRB 510 (1995); *United Brotherhood of Carpenters*, 312 NLRB 903 (1993).

V. ACCRETION

The Board considers a number of factors in determining whether the employees sought to accreted share an "overwhelming" community of interest with the existing unit such that the sought after employees have little to no separate group identity, including: centralization of management and administrative control; the degree of the integration of operations; geographic proximity; similarity of working conditions, skills and functions; common control of labor relations; collective bargaining history; degree of separate daily supervision; and degree of employee interchange. *North Hills Office Services,* 342 NLRB 437 (2004); *Frontier Telephone,* 344 NLRB 1270 (2005).

Centralization of management, administrative control and common control of labor relations:

The factors of centralization of management and administrative control and common control of labor relations tend to weigh in favor of accretion based on the evidence before me. As I discussed in detail, above, the Hospital, pursuant to the Agreement, and subject to the Partnership, is responsible for, among many things, hiring, directing, supervising and discharging non-physician personnel at the Surgery Center. It is also responsible for establishing wage structures, personnel policies and directing day-to-day operations of the Surgery Center. In this connection, Tourigny, who is the vice-president of human resources and organizational development for the Hospital is responsible for oversight of labor relations issues for the Hospital and he also oversees human resources and labor issues for the Surgery Center and its employees. Likewise, Tourigny testified that the director of surgery for the Hospital has some oversight responsibility for the Surgery Center. I am mindful that the testimony also reflects that Lexa Woodyard as administrator of the Surgery Center handles employee matters on a daily basis and she does not need Tourigny's approval in so doing. As I previously noted, the record does not provide details about the mechanics and coordination between the facilities regarding hiring and firing and other labor relations and management matters, but given the Agreement and lack of specific evidence indicating the Hospital, as Manager, does not exercise the authority given to it, I find that these criteria favor accretion.

Integration of operations and geographic proximity:

Turning to the integration of operations and geographic proximity criteria, the evidence reflects that the Surgery Center and Hospital are nearby to one another but operate in distinct facilities. Each apparently has its own equipment inasmuch as the only identified shared equipment is the sterad machine operated by a Hospital O.R. technician. The testimony reflects that the majority of the Surgery Center doctors also work at the Hospital but there is no evidence detailing the doctors' contractual or employment relationship with each and the impact, if any, on employees. Colliflower testified that he can look at the Hospital's and Surgery Center's schedule from the Hospital but, again, no evidence was presented showing the purpose or relevance of this. The record reflects that if there is a complication with a surgery at the Surgery Center the patient will be transferred to the Hospital. The record does not disclose whether this was a result of some pre-determined arrangement or simply because of geographic proximity.

The Hospital's staff clean and maintain the Surgery Center. In connection with the latter, the director of maintenance for Hospital adjusted a grievance assigning construction work at the Surgery Center to bargaining unit maintenance employees. However, I find extremely relevant that there appears to be little interaction or contact among employees of each facility in the performance of their job duties, and the petitioned for employees work in a separate area, and their work does not appear at integrated with, or much dependent upon, the Hospital employees and vice versa. See, *Ryder Integrated Logistics, Inc.,* 329 NLRB 1493 (1999) (Administrative Law Judge noted that there was some operational integration but employees in question had minimal contact with one another and what mattered was whether there is an integration of employee interests); *Milwaukee City Center, LLC,* 354 NLRB No. 77 (September 21, 2009); *Bryan Infants Wear Company*, 235 NLRB 180 (1978); Cf. *Frontier Telephone,* supra at 1272. Furthermore, there was no evidence indicating that the employees share any common work area or facilities or that they undergo shared trainings, meetings, or any other work related events. See, *Archer Daniels Midland*, 333 NLRB 673 (2001). Thus, although there is some degree of integration between the facilities, I find more compelling the evidence showing little contact between the petitioned for employees and unit employees, and the lack of integration in executing their work duties. Therefore, I conclude that this factor does not weigh in favor of accretion. However, the facilities are certainly geographically close inasmuch as the Surgery Center is about a block away from the Hospital and, therefore, this geographic proximity factor supports an accretion finding.

Similarity of skills, functions and working conditions:

With respect to the similarity of skills, functions and working conditions, Colliflower testified that his duties while working at the Surgery Center are similar to those he works under while working at the Hospital. Likewise Maynard, O.R. sterile technician, testified that the job description of her position at the Hospital is similar to the job description she had while working for the Surgery Center, where she worked before being hired by the Hospital in 2004. [6]/ However, the Petitioner failed to present any evidence of the duties, skills and functions of the other classifications of petitioned for employees. Moreover, it failed to present any of the rules, policies, or handbooks covering Surgery Center employees or any evidence related to these

[6]/ I note that Maynard worked at the Surgery Center prior to the Hospital becoming a majority owner.

employees' hours of duty, benefits and wages. Tourigny summarily testified that the employees of the Surgery Center receive different benefits than those employed by the Hospital. I find that even though there is some record evidence that the Hospital and Surgery Center employees have similar duties, the Petitioner failed to present sufficient evidence for me to conclude that these employees share sufficient common working conditions warranting accretion. *Ryder Integrated Logistics*, *Inc*., 329 NLRB 1493, 1500 (1999).

History of collective bargaining:

Regarding the history of collective-bargaining criterion, there is no bargaining history to consider as it relates to the Surgery Center since the Employer did not become majority owner of the Surgery Center until April 2008. See, *Bryan Infants Wear Company*, 235 NLRB 1305 (1978). Moreover, the record testimony about discussions between the Hospital and Petitioner regarding the appropriateness of including the Surgery Center employees in the bargaining unit during prior negotiations was conflicting and unclear and took place before the Hospital had a controlling interest in the Surgery Center. However, the Petitioner does represent the Employer's employees in similar classifications currently employed at the Hospital, its auxiliary locations, and at certain outside clinics covered by the letter of agreement. [7]/ On balance, I find that this factor tilts, only slightly, in favor of an accretion finding.

Common supervision:

Based on the record before me it appears there is little to no common day-to-day supervision of employees, a critical element to finding accretion appropriate. The parties stipulated at hearing that Lexa Woodyard, administrator, Delores Blatt, nurse manager, Sharyn McDonald, nurse manager, and Floyd Adams, maintenance manager, are supervisors as defined by the Act of the Surgery Center so there is certainly some level of supervisory autonomy at the Surgery Center. See, *North Hills Office Services*, 342 NLRB 437, fn. 1 (2004). Moreover, Tourigny testified that Woodyard is responsible for employee matters on a day-to-day basis and can make decisions without his approval. Colliflower testified that while working as a pool employee at the Surgery Center his supervisor is Sharyn McDonald, who supervises all the surgery technicians employed by the Surgery Center. Indeed, when he applied for the position at the Surgery Center he interviewed, not with a Hospital supervisor, but with McDonald. When working at the Hospital he is immediately supervised by Debbie Hall or Mike Babcock. Although Colliflower made mention in the record that most of the physicians of the Surgery Center also work at the Hospital there is no record testimony explaining what, if any, supervisory role they play vis-à-vis the bargaining unit and petitioned for employees.

Maynard testified that she is supervised by Hospital supervisor David Taylor and there is no indication that Taylor has any supervisory position at the Surgery Center. The record discloses that when housekeeping employee Burns is performing floor work at the Surgery Center he may receive direction and guidance from Surgery Center supervision but he clearly does not view anyone from the Surgery Center as a supervisor of his; and if he has a problem

[7]/ I am aware that there is a lease agreement between the Hospital and a third party permitting employees of the Dialysis Center, which is no longer wholly owned by the Hospital, to be represented by the Petitioner for 5 years. However, at the time of the execution of the most recent collective-bargaining agreement, the Hospital did wholly own the Dialysis Center and by the terms of the lease agreement the Petitioner's representative status over these employees is limited. Thus, I do not find this agreement particularly relevant to the accretion issue.

while working at the Surgery Center he contacts his immediate supervisors from the Hospital. In short, there is simply no indication in the record that any Hospital employee, and Surgery Center employee in the unit sought to be accreted, share an immediate supervisor. As the Board noted in *Super Valu Stores, Inc.*, 283 NLRB 134 (1987), distinct day-to-day supervision is accorded much weight since the day-to-day problems and issues at one location may not be shared by employees of another location who are separately supervised. Thus, this vital factor certainly weighs heavily against finding accretion appropriate.

Employee interchange:

I now turn to the other critical element in determining the appropriateness of accretion, that of employee interchange. In evaluating this element I note that the Board places more weight on the degree and frequency of temporary transfers more than permanent transfers. *Milwaukee City Center, LLC.*, 354 NLRB No. 77 (2009). I find that this factor strongly militates against accreting the Surgery Center employees. In so finding, I note the absence of any evidence that any employee of the Surgery Center has been permanently transferred to the Hospital or that an employee at the Hospital has been permanently transferred to the Surgery Center. More importantly, the record did not reveal any examples of employees of the Surgery Center being transferred to the Hospital on a temporary basis or the employees of the Hospital being transferred over to the Surgery Center to work on a temporary basis. Certainly, the fact that Colliflower and Damron work at both facilities is not reflective of interchange particularly in light of the evidence showing the Hospital never assigns or schedules Colliflower to work at the Surgery Center and, more importantly, he and Damron are not employed in a unit classification while working at the Surgery Center. [8]/ This complete lack of evidence showing any interchange of employees between facilities strongly mitigates against accreting the Surgery Center employees into the already existing unit.

The cases cited by the Petitioner to support its position in favor of accretion are distinguishable from the facts presented in the record before me. In *Safety Electric Corporation*, 239 NLRB 40 (1978), the employer was a "mom and pop" outfit with very little dilution of centralized authority, in contrast to the Employer, which is much larger and where there is very clearly delegation of management control. In *Ogden Entertainment Services, Inc*., 1997 U.S. App. LEXIS 746 (9th Cir. 1997), the Board emphasized evidence of the employees' common supervision by an on-site supervisor, a factor noticeably absent here. Likewise, *Hudson Pulp and Paper Corporation*, 117 NLRB 416 (1957) is easily distinguishable in that it involved an employer that created a new department and the new department was extremely integrated with the existing facility and about half of the new department's employees were transferees. Further, the Hospital here did not simply expand as was the case in *Richfield Oil*, 119 NLRB 1425 (1958), wherein the employer started drilling off shore using unit employees from its onshore locations.

The Petitioner cited *Safeway Stores, Inc*., 276 NLRB 944 (1985) for its claim that the Board finds evidence of an employer hearing grievances concerning issues at the new facility

[8]/ Additionally, I am aware that the Hospital's housekeeping and maintenance employees are assigned work at the Hospital, its offsite locations and the Surgery Center but these work assignments do not serve as evidence of temporary transfers. The work performed by housekeeping and maintenance Hospital employees at the Surgery Center demonstrates some degree integration of operations but when a housekeeper is assigned to clean the Surgery Center floor he is not being transferred to the Surgery Center.

particularly relevant and argues that this type of evidence is presented before me. However, in *Safeway*, the grievances apparently involved the employees at the *new* facility and were adjusted by a district manager rather than local manager, which was a relevant factor in deciding the degree of common control over labor relations. In the instant matter, a grievance was filed by bargaining unit employees and adjusted by their Hospital manager. It was not filed by, or related to, the petitioned for group of employees at the Surgery Center and, because of this distinction, it has less weight towards an accretion finding--although I have noted the grievance adjustment and the work performed by the maintenance employees in considering single employer status and the degree of integration between the two facilities.

In *Super Value Stores, Inc*., 283 NLRB 134 (1987), also cited by the Petitioner, the Board concluded accretion to be inappropriate even though there was apparently greater functional integration and contact between employees than in the present case. In so finding, the Board highlighted the fact that there was distinct day-to-day supervision and a lack of integration between the locations involved. In relying on *Super Valu,* supra; *United Food and Commercial Workers,* 267 NLRB 891 (1983) and other cases cited in its brief, the Petitioner continually presumes a finding that there is significant employee contact and interchange between the employees of the Surgery Center and the Hospital. I, however, have reached different factual findings and, thus, the cases relied upon by the Petitioner, although correctly cited for its legal analysis, lend less support for its position because of the factual distinctions between those cases and the record before me.

As in most accretion cases there are some factors favoring accretion and some militating against. Here the factors that favor accretion are: centralization of management and administrative control, common control of labor relations, history of collective bargaining, and geographic proximity. The factors weighing against accretion are: degree of integration of operations, similarity of working conditions, skills and functions and, more importantly, the critical criteria of degree of separate daily supervision and degree of employee interchange. On balance, in weighing all factual circumstances included in each criterion, I find that the Petitioner failed to demonstrate that the Surgery Center employees share an overwhelming community of interest with the Hospital bargaining unit employees and that Surgery Center employees have little to no group identity. In reaching this conclusion, I particularly note that there is no record evidence of employee interchange between the Hospital and Surgery Center involving bargaining unit employees and the employees sought to be included. Further, I note that the record shows that there is separate day-to-day supervision of the employees of the Hospital and Surgery Center. With these two "critical" factors of common daily supervision and employee interchange absent, I conclude that accreting the Surgery Center employees into the existing unit would be inappropriate. Accordingly, I will dismiss the unit clarification petition.

VI. CONCLUSIONS AND FINDINGS

Based upon the foregoing and the entire record in this matter, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. [9]/

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner proposes to clarify the bargaining unit by including all employees of the Surgery Center with the same job classifications as bargaining unit employees.

5. Clarification of the bargaining unit is not warranted inasmuch as the Surgery Center employees do not share an overwhelming community of interest with the Hospital's bargaining unit employees.

ORDER

The petition filed in this matter is dismissed

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 9, 2010**, **unless filed electronically.** Consistent with the Agency's E-Government initiative, parties are **encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on **June 16, 2010**. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. [10]/ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not excused on the basis that the transmission could not be

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[9]/ The parties stipulated at hearing, and I find, that the Hospital is engaged in the operation of a non-profit hospital in Huntington, West Virginia. During the past 12 months, a representative period, the Hospital derived gross revenues in excess of $250,000. During the same representative period, the Hospital purchased and received materials valued in excess of $50,000 directly from points located outside the state of West Virginia.

[10]/ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Cincinnati, Ohio this 2nd day of June 2010.

/s/ Gary W. Muffley
Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
Room 3003, John Weld Federal Building
550 Main Street
Cincinnati, Ohio 45202

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